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IN THE

Supreme Court of The United States

OCTOBER TERM, 1970

NO. 1451

DONALD LEE MAXWELL,

Petitioner,

vs.

STATE OF INDIANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ISSUES PRESENTED FOR REVIEW

In substance Petitioner has presented the following issues:

1. Whether the indictment upon which he was convicted of first degree murder was fatally defective.

2 Whether the evidence showed that the killing was accidental or purposeful.

3. Whether certain hearsay testimony as to motive was admissible.

STATEMENT OF THE CASE

Respondent opposes Petitioner's statement (Br. p. 4) that he was arrested pursuant to an indictment charging "suicide." The indictment alleged first degree murder.

Respondent also disagrees with Petitioner's statement (Br. p. 4) that his Motion for New Trial "substantially preserved the Federal questions sought here to be reviewed". The Motion for New Trial did not claim as error defects in the indictment nor error in admission of hearsay testimony. Because the record of the proceedings was submitted by Petitioner concurrently with the filing of his Petition in this Court, Respondent has been denied the opportunity of using the transcript to counter whatever factual allegations Petitioner may make regarding the evidence. However, Petitioner's Brief in the Indiana Supreme Court sets out, at p. 6, his Motion for New Trial. It has not preserved the indictment and hearsay issues for appellate review. Thus review cannot be had in this Court at this time on a petition for certiorari.

There are many omissions from the facts which Petitioner has recited in his Statement of the Case, facts which are favorable to the Respondent's case. Respondent, without opportunity to view the record, cannot correct these omissions; all that can be done is to direct this Court's attention to the review of the testimony contained in the opinion of the Indiana Supreme Court. That court's opinion shows that the testimony of the eye-witness to the shooting, Robert Mann, was fully probative of the element of premeditation, although Petitioner claims "The balance of Mann's testimony was somewhat youthful and confused." (Br. p. 7). Yet it is this omitted testimony, by an eighteen year old eyewitness, that is crucial.

The only record of the evidence available to Respondent now is the Respondent's summary of the evidence in its brief in the Indiana Supreme Court. Respondent's Brief in the appeal below disclosed the following:

On September 17, 1967, about 11 A.M. the Petitioner arrived at the Gulf Service Station, 3750 E. Prospect, Indianapolis, which he operated. The victim, Rainey Hughes, arrived there about 4 P.M. (Tr. p. 122, ll. 7-12, 23-27; p. 123, ll. 1-6; p. 139, ll. 21-22). Shortly after the victim's arrival, both men began sharing a pint of liquor, and continued to do so for about three (3) hours in the wash rack on the side lot (Tr. p. 125, ll. 12-27; p. 126, ll. 1-8).

The victim's wife was suing him for divorce so that she could marry Petitioner. The victim was contesting the divorce. Although the victim's wife had a restraining order against the victim, she permitted him to live at home. And she was seeing Petitioner. (Tr. p. 128, ll. 16-27; p. 129, ll. 1-6).

The victim became tired and wanted to go home and go to bed. Petitioner refused to let him go, and they argued. Petitioner left the station to ask the victim's wife if the victim could come home. When Petitioner returned from the victim's house, he told the victim his wife did not want him to come home (Tr. p. 130, ll. 1-12; p. 132, ll. 3-12; p. 157, ll. 9-13).

Petitioner became "pretty mean". He pointed a .25 caliber 8 shot Omega revolver at the victim's chest as they were arguing. There was no struggle. (Tr. p. 179, ll. 8-16; p. 180, ll. 3-9; p. 207, ll. 7-16, 23-27).

Petitioner shot the victim, who then walked into the station and told his son that Petitioner had shot him. The victim then fell to the ground (Tr. p. 179, ll. 26-27; p. 180, ll. 1-2; p. 132, ll. 21-27; p. 133, ll. 1-4; p. 158, ll. 1-5, 13-14).

Petitioner then came out of the front door of the station, gun in hand, and hurriedly drove off in his car without saying anything. He returned to the station about forty-five (45) minutes to an hour later (Tr. p. 133, ll. 25-27; p. 134, ll. 1-8; p. 159, ll. 2-7).

The police were radioed to the scene at 8:09 P.M.. Petitioner came back to the scene about twenty-five (25) minutes after the police arrived, surrendered the gun and admitted he had shot the victim (Tr. p. 204, ll. 16-17; p. 205, ll. 22-25; p. 206, ll. 9-10).

Mary Balay, daughter of the victim, testified that September 17, 1967, the day her father was shot, was a Sunday. On the Thursday immediately preceding that Sunday, she and her mother had driven to the Gulf station for gas. Petitioner was there and began talking with Mary's mother (Tr. p. 228, ll. 4-10, 13-27; p. 232, ll. 9-27; p. 233, ll. 1-2).

The following testimony then transpired:

"A. And I had went in to get some cigarettes, and I came back out, and they were standing there talking. And I heard Mr. Maxwell say, "I'll shoot him if he comes back up on my drive again." And I said who"

* * * * *

"Q. Did you know who Mr. Maxwell was talking about?

A. Well, I asked him, and he said "Pop."

Q. Pop?

A. That's what they called my dad.

Q. Your father?

A. Yes." (Tr. p. 233, ll. 3-7, 23-27; p. 234, l. 1).

ARGUMENT

I

THE INDICTMENT WAS SUFFICIENT TO INFORM PETITIONER OF THE NATURE AND CAUSE OF THE ACCUSATION AGAINST HIM.

Petitioner has set forth (Br. p. 6) only the second clause of his indictment. The *entire* indictment reads as follows:

> "The Grand Jury for the County of Marion in the State of Indiana, upon their oath do present that DONALD LEE MAXWELL on or about the 17th day of September, A.D. 1967, at and in the County of Marion did then and there unlawfully, feloniously, purposely and with premeditated malice kill and murder RAINEY HUGHES, with a certain gun loaded with gunpowder and metal bullets, then and there held in the hand of the said DONALD LEE MAXWELL, and did then and there and thereby inflict mortal wounds in and upon the body of the said RAINEY HUGHES, of which mortal wounds the said RAINEY HUGHES, then and there and thereby died; And so the Grand Jury aforesaid, upon their oaths aforesaid, do say and charge that the said RAINEY HUGHES, in the manner and form and by the means aforesaid, unlawfully, feloniously, purposely and with premeditated malice did kill and murder the said RAINEY HUGHES, then and there being . . . contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Indiana . . ."

Due to a clerical error the name "Rainey Hughes" was incorrectly placed in the second clause. Upon this technicality Petitioner seeks review in this Court. It is clear that

the indictment sufficiently informed Petitioner, in the *first* clause, that he was charged with the premeditated, malicious killing of Rainey Hughes by shooting him with a gun. The second clause of the indictment was surplusage. The spirit of the Sixth Amendment was not violated by this indictment. Petitioner's claim that he "has never, to this date, been apprised of the nature of the accusation so as to enable him to prepare a defense" cannot be taken seriously. *Kennedy v. State,* 62 Ind. 136 (1878).

II

THE EVIDENCE WAS SUFFICIENT TO FIND THAT THE KILLING WAS NOT ACCIDENTAL BUT WAS PREMEDITATED.

While Respondent does not have the record to examine, it is clear from the Indiana Supreme Court's opinion that there was premeditation. The witness Robert Mann, whose testimony has been omitted by Respondent's factual summary, saw Petitioner point his gun at the victim and shoot him:

> A. Tell what happened—well, I was standing near the machine, you know, talking to Floyd. Anyway, the defendant and Hughes was walking, you know, and they were arguing, they was. Well, I didn't pay no attention to them, you know, they was arguing, pretty high, they was. Then they walked out on the ramp over to near two cars, they was. They was talking, and so I kept on talking to Floyd. And me and Floyd was looking at them, then we turned around and started talking again. So then when I turned around the next time, the defendant, you know, had a gun on Hughes. So I was still talking to Floyd, and then when I turned around again, that's when the gun went off.

Q. And did you say that the defendant had a gun on Hughes? How do you mean, he had a gun on him?

A. He had it pointed at him.

Q. Pointed at him?

A. Yes.

Q. What part of his body was it pointed at?

A. Right up in here.

Q. Up to the chest?

A. Yes.

Q. And then you turned back around, you say?

A. Yes.

Q. And you say them? And when you—after you turned back around, that's when you heard the shot, is that it?

A. I turned back to Floyd and then I turned around, that's when the gun went off.

Q. That's when the gun went off"

A. That's right.

Q. Did you see the defendant, Donald Maxwell, shoot Rainey Hughes?

A. Yes. When I turned around, that's when the gun went off that was in his hand." 260 N.E.2d at 789-790.

Under a well settled Indiana rule, the intention to kill, followed by premeditation, "although they follow as instantaneous as successive thoughts can follow each other"

is sufficient to constitute premeditation supportive of a conviction of first degree murder. *Everett v. State* 208 Ind. 145, 195 N.E. 77 (1934). In the instant case the Indiana Supreme Court found that ". . . the pointing of the gun and the shooting were not simultaneous, but rather separated by a time lapse, sufficient for appellant to have deliberated upon his intent." 260 N.E.2d at 790. This finding is supported fully by the quoted testimony. Premeditation was supported by the testimony of the eyewitness, Robert Mann.

III

THE HEARSAY TESTIMONY OF MARY BALAY WAS PROPERLY ADMITTED AGAINST PETITIONER

Petitioner has not set out the testimony to which he objects. Therefore this Court cannot ascertain whether it is hearsay or not. Respondent, however, will quote from the State's brief on appeal in the court below. Mary Balay testified as follows:

> "A. And I had went in to get some cigarettes, and I came back out, and they were standing there talking. And I heard Mr. Maxwell say, I'll shoot him if he comes back up on my drive again! And I said who."
>
> * * *
>
> "Q. Did you know who Mr. Maxwell was talking about?
>
> A. Well, I asked him, and he said "Pop."
>
> Q. Pop?
>
> A. That's what they called my dad.

Q. Your father?

A. Yes." (Tr. p. 233, 234).

The Indiana Supreme Court ruled that Petitioner did not object to this testimony at trial, nor did he move to strike it from the record, and that the issue was not before the court on appeal. 260 N.E.2d at 791. As noted in *Henry v. Mississippi,* 379 U.S. 443 (1965), a state has a legitimate interest in a contemporaneous objection rule.

> "It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions." 379 U.S. at 446.
>
> * * *
>
> "The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest." 379 U.S. at 448.

Petitioner's Motion for Withdrawal of the Case from the Jury, made at the close of the State's case, did not mention the hearsay as a basis for the motion. (Appellant's Brief below, p. 21, Tr. p. 241-243). Thus the *Henry* observation that the purpose of the contemporaneous objection rule can be met by a motion for directed verdict, where the illegal evidence is the *basis* of the motion, is not applicable here. (379 U. S. at 448).

Moreover, while Mary Balay's testimony was hearsay, it was admissible hearsay because threats against a homicide victim in a murder case are admissible, as an exception to the hearsay rule. *Goodwin v. State,* 96 Ind. 550 (1884); *Cluck v. State,* 40 Ind. 263 (1872).

> "Accordingly, it has never been doubted that the *threats* of an *accused person* are admissible to show

his doing of the deed threatened . . ." *Wigmore on Evidence* 3rd Ed., Vol. VI, § 1732, p. 99.

The admission of the hearsay testimony of Mary Balay was not reversible error.

CONCLUSION

For these reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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